

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>FRANCISCO BENITEZ</b>	)	
Claimant	)	
VS.	)	
	)	
<b>IBP, INC.</b>	)	Docket No. 190,119
Respondent	)	
Self-Insured	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent requested review of the Award dated March 3, 1997, and the Nunc Pro Tunc Award dated March 5, 1997, entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument on July 23, 1997. Board member Gary M. Korte recused himself from this proceeding, and Stacy Parkinson participated in his place as a board member pro tem.

**APPEARANCES**

Leah Brown Burkhead of Mission, Kansas, appeared on behalf of claimant. Tina M. Sabag of Dakota City, Nebraska, appeared on behalf of respondent, a qualified self-insured. Michael G. Patton of Emporia, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed and considered the record as identified in the Award.

**ISSUES**

The Special Administrative Law Judge awarded benefits for repetitive mini-trauma causing bilateral injuries to the hands and shoulders. The Special Administrative Law Judge found a work disability stemming from a series of repetitive traumatic injuries beginning on November 15, 1993. For purposes of the Award, the Special Administrative Law Judge used November 15, 1993, as the date of accident.

On appeal, respondent contends that the Special Administrative Law Judge erred in finding that the claimant had a 59.2 percent work disability. Rather, respondent argues claimant's benefits should be limited to those for a functional impairment only. Respondent argues that claimant sustained two separate scheduled injuries occurring at distinct and separate times. Respondent argues claimant is not entitled to a work disability award since there has not been an injury to the body as a whole. In the alternative, respondent argues claimant retained the ability to earn 90 percent of his hourly wage rate and, therefore, is not entitled to a work disability.

Respondent also argues that the claimant is not entitled to an award of future medical because there is no evidence in the record to support that request. Respondent believes that unauthorized medical should be limited to \$350.

Finally, respondent contends that the Kansas Workers Compensation Fund should be responsible for "the majority of the award" because the claimant's injuries to the left upper extremity would not have occurred "but for" the problems with the right upper extremity which is attributable to the claimant's underlying predisposition to Kienböck's disease.

The issues now before the Appeals Board on this review are:

- (1) What is the nature and extent of claimant's injuries and disabilities?
- (2) What is the liability of the Workers Compensation Fund?
- (3) Is claimant entitled to future medical and up to \$500 in unauthorized medical benefits?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant began working at IBP for a second time in 1989. He worked in various capacities and without incident until August 1993. At that time, claimant began to experience symptoms in his right hand and right wrist. Claimant continued to work until November 15, 1993, when the pain in the right wrist became more severe. He was referred to the plant doctor and placed on modified duty. Beginning November 15, 1993, claimant performed light duty work using his left hand.

On February 14, 1994, claimant was referred to Dr. Bradley Storm who diagnosed Kienböck's disease and right-sided carpal tunnel syndrome. Dr. Storm restricted claimant

from using his right hand and claimant returned to work using his left hand only. On August 23, 1994, claimant underwent surgery on his right hand and wrist which included a carpal tunnel release. Claimant remained off work for several weeks following surgery.

Before surgery, on August 18, 1994, claimant made his initial complaint to Dr. Storm with regard to pain and problems with the left upper extremity. When claimant returned to work on November 23, 1994, he was restricted to using his left hand only. Upon his return to work, claimant began to experience symptoms in his left upper extremity and shoulder. He also noticed a worsening of his right hand and wrist and pain in his right shoulder as well as problems with his neck. On February 22, 1995, Dr. Dale Darnell prescribed physical therapy for bilateral shoulder problems.

On March 21, 1995, Dr. Storm released claimant with restrictions and provided a 15 percent permanent partial disability rating to the right upper extremity. Claimant continued to work within his restrictions until May 16, 1995, at which time IBP advised that they no longer had work available for the claimant within Dr. Storm's restrictions. Claimant remained off work from May 16 to December 19, 1995, when he returned to work at an accommodated position.

While claimant was off work, he underwent several independent medical evaluations. Dr. Edward J. Prostic examined claimant at his attorney's request. Dr. Prostic diagnosed fairly severe thoracic outlet syndrome and bilateral carpal tunnel and cubital tunnel syndromes. Dr. Prostic also opined that claimant had sustained a 50 percent whole body functional impairment as well as significant restrictions to both upper extremities. Based upon the permanent impairment and restrictions, Dr. Prostic believed that claimant had suffered a 100 percent loss of ability to perform the job tasks that he had performed for the 15 years before his injuries at IBP.

Dr. Philip R. Mills conducted an independent medical evaluation on behalf of the respondent. Dr. Mills found a 15 percent functional impairment to the right upper extremity based upon the carpal tunnel syndrome. Dr. Mills found no other impairment.

Finally, Dr. P. Brent Koprivica conducted an independent medical evaluation at the request of the Administrative Law Judge. Dr. Koprivica diagnosed chronic myofascial pain syndrome as well as bilateral carpal tunnel syndrome. Dr. Koprivica recommended significant permanent restrictions and determined that claimant suffered a 24 percent whole body impairment of function. Dr. Koprivica specifically noted claimant had a 25 percent functional impairment to the right upper extremity.

Respondent argues that claimant is limited to recovering for two separate scheduled injuries under the rationale of Depew v. NCR Engineering and Manufacturing, \_\_\_ Kan. \_\_\_, 932 P.2d 461 (1997). Respondent argues that the claimant in this case, like Depew, suffered distinct and separate rather than simultaneous injuries to each upper extremity. In reading Depew, along with Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986), the Appeals Board would agree with respondent that in order for scheduled injuries to rise to

the level of a body as a whole injury, the injuries must occur simultaneously and not at distinct and separate points in time.

When considering the entire record, the Appeals Board finds that claimant has sustained two separate accidents based upon repetitive use traumas that occurred over a period of time. Unfortunately, a determination as to the dates of those two separate accidents is not clear from the record. Claimant's Application for Hearing, Form E-1, was filed on May 26, 1994, and alleges "cumulative trauma commencing 11/93 & continuing" to the "right and left hands, wrists, upper extremities, shoulders and neck." At the Regular Hearing on April 25, 1996, Administrative Law Judge Palmer stated the following:

This case arose here in Lyon County, Kansas as a series of accidents through November 15th, 1993, resulting in accumulative trauma and myofacial [*sic*] pain.

Respondent admits Claimant met with personal injury by accident on or about the date alleged . . . .

In the Award entered by Special Administrative Law Judge William F. Morrissey on March 3, 1997, Stipulation 1 states the following:

Claimant met with personal injury by accident by a series [of] accidents arising out of and in the course of employment on November 15, 1993 and continuing.

Although the dates alleged, pled, stipulated to, and awarded are not identical, the Appeals Board finds sufficient evidence in the record to make a finding of two separate accident dates.

The Appeals Board finds claimant sustained accidental injury to the right upper extremity as the result of a series of repetitive micro-trauma which culminated in permanent injury on November 15, 1993. For award purposes, November 15, 1993, is the appropriate date of accident for the right upper extremity because it was the last date that claimant used his right arm to perform his work before undergoing right hand and wrist surgery in August 1994.

The Appeals Board finds that claimant sustained a second and separate injury to the body as a whole beginning on November 23, 1994, and continuing through May 16, 1995. The record contains substantial evidence that claimant began experiencing substantial pain in both upper extremities following his return to work on November 23, 1994. Claimant continued to work and simultaneously developed pain in both shoulders and into his neck. He was subsequently diagnosed with bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, severe thoracic outlet syndrome, and myofascial pain syndrome. Based upon Dr. Koprivica's testimony, the Appeals Board finds claimant experienced cumulative traumatic injury to his left arm, shoulder, and upper back from November 23, 1994, through May 16, 1995, which has resulted in chronic myofascial pain syndrome. The Appeals Board

finds May 16, 1995, as the appropriate date of accident for computation purposes for this second period of accident as that is the last day claimant worked before being laid off due to lack of work within his permanent restrictions. Further, the record does not establish that claimant sustained any injury after that date.

Inasmuch as the Appeals Board finds that claimant has sustained two separate injuries, it is appropriate to make a determination as to the extent of permanent disability sustained by the claimant with regard to both injuries.

With regard to the scheduled injury to the right upper extremity, both Dr. Storm, the authorized treating physician, and Dr. Mills determined that claimant has sustained a 15 percent functional impairment to the right upper extremity. Dr. Koprivica found a 25 percent functional impairment to the right upper extremity. As such, averaging the lowest and highest ratings, the Appeals Board finds that claimant sustained a 20 percent permanent partial impairment to the right upper extremity for which he should receive permanent partial disability benefits as provided by K.S.A. 44-510d.

With regard to the second injury to the body as a whole, the Appeals Board agrees that claimant has sustained a significant work disability due to the permanent disability and restrictions placed upon him by all of the physicians. Specifically, it is clear that from May 17, 1995, through December 18, 1995, claimant sustained a 100 percent work disability as provided by K.S.A. 44-510e. That conclusion is based on the finding that claimant's injuries have rendered him unable to perform any of his former work tasks which he performed in the 15-year period preceding his May 1995 accident, coupled with the finding that claimant had a 100 percent difference in pre- and post-injury average weekly wage during the period claimant was off work. The Appeals Board rejects respondent's argument that claimant was not looking for employment between May and December 1995 and specifically finds to the contrary.

However, because claimant's 100 percent task loss incorporates and includes the tasks lost as a result of the right arm injury, respondent is entitled to a credit for preexisting functional impairment under the provisions of K.S.A. 44-501(c). Taking official notice of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) the Appeals Board finds claimant's 20 percent functional impairment to the right arm equates to a 12 percent whole body functional impairment. Subtracting the preexisting impairment from the 100 percent work disability found above yields an 88 percent work disability for which claimant should receive permanent partial disability benefits for the period from May 17, 1995, through December 18, 1995.

On December 19, 1995, claimant was returned to work at an accommodated position with an 18.4 percent wage loss. That conclusion is based on comparing claimant's stipulated average weekly wage of \$458.92 to claimant's post-injury wage of \$374.49 as determined by the Special Administrative Law Judge after reviewing the exhibit containing post-injury wage information introduced at the continuation of the regular hearing held on June 10, 1996. As such, as of December 19, 1995, claimant has sustained a 59.2 percent work disability, averaging the percentage of wage loss with the 100 percent task loss as

required by statute. Subtracting the 12 percent preexisting functional impairment from 59.2 percent yields a 47.2 percent work disability upon which claimant should receive permanent partial disability benefits commencing December 19, 1995.

The decision to award benefits based upon a work disability does require a brief discussion and findings regarding the claimant's average weekly wage. Noting an error in the Special Administrative Law Judge's Award, the Appeals Board finds that the average weekly wage on the date of accident amounted to \$458.92 without including fringe benefits. Claimant's fringe benefits amounted to \$25.26 per week and are applicable to the time period from May 17, 1995, through December 18, 1995, when claimant was not working and the fringe benefits had been terminated. During that time period, claimant's average weekly wage was \$484.18.

Finally, it should be noted that claimant sustained \$426.10 in unauthorized medical expenses. The Special Administrative Law Judge erroneously awarded unauthorized medical expense of up to \$350. Obviously, this claim was filed and pertains to a period of time after the law changed. Therefore, pursuant to K.S.A. 44-510(c)(2) the Appeals Board finds that the claimant is entitled to up to \$500 in unauthorized medical expense.

The Appeals Board agrees with the Special Administrative Law Judge that the Workers Compensation Fund has no liability in this proceeding. Respondent argued that claimant sustained two separate accidents with the first involving the right hand and the second injuring the left hand and shoulders. Respondent argued the second injury was caused by the first injury and, therefore, the Workers Compensation Fund was liable for either all or a portion of the benefits payable for that second injury.

As indicated above, the Appeals Board found claimant sustained two accidental injuries. However, the second injury occurred during the period from November 23, 1994, through May 16, 1995. Therefore, there can be no Fund liability for this second accidental injury pursuant to K.S.A. 44-567 which relieves the Workers Compensation Fund from liability for accidents occurring on and after July 1, 1994.

The Appeals Board finds claimant is entitled to future medical benefits upon proper application to the Director.

The Appeals Board hereby adopts as its own the findings and conclusions set forth by the Special Administrative Law Judge in the Award to the extent those findings and conclusions are not inconsistent with the above.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated March 3, 1997, and the Nunc Pro Tunc Award dated March 5, 1997, entered by Special Administrative Law Judge William F. Morrissey, should be, and are hereby, modified.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Francisco Benitez, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred November 15, 1993, and based upon an average weekly wage of \$458.92 for 14.86 weeks of temporary total disability compensation at the rate of \$305.96 per week or \$4,546.57, followed by 37.03 weeks at the rate of \$305.96 per week or \$11,329.70, for a 20% permanent partial disability to the right upper extremity, making a total award of \$15,876.27, all of which is currently due and owing and ordered paid.

**AN AWARD OF COMPENSATION IS ALSO HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Francisco Benitez, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred May 16, 1995, and based upon an average weekly wage of \$484.18 for 30.86 weeks for the period from May 17, 1995, through December 18, 1995, at the rate of \$319 per week or \$9,844.34, for an 88% work disability, and based upon an average weekly wage of \$458.92 for the period beginning December 19, 1995, at the rate of \$305.96 per week for 165.02 weeks or \$50,489.52, for a 47.2% work disability, making a total award of \$60,333.86.

As of October 8, 1997, there is due and owing claimant for this second accident 30.86 weeks of permanent partial disability compensation at the rate of \$319 per week or \$9,844.34, followed by 94.28 weeks of permanent partial disability compensation at the rate of \$305.96 per week in the sum of \$28,845.91 for a total of \$38,690.25, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$21,643.61 is to be paid for 70.74 weeks at the rate of \$305.96 per week, until fully paid or further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Leah Brown Burkhead, Mission, KS  
Tina M. Sabag, Dakota City, NE  
Michael G. Patton, Emporia, KS  
Philip S. Harness, Director  
Stacy Parkinson, Olathe, KS